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OCTOBER TERM, 1988

JOHNNY PAUL PENRY,
Petitioner

vs.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE
HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION

STANLEY G. SCHNEIDER
11 GREENWAY PLAZA
HOUSTON, TEXAS 77046

ATTORNEY FOR
AMICUS CURIAE

TABLE OF CONTENTS

LIST OF AUTHORITIES

Cases

Statutes and Constitutions

Other Authorities

NO. 87-6177

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW AMICUS CURIAE HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION, by and through its attorney Stanley G. Schneider and pursuant to Rule 36.1, it would respectfully show the Court as follows:

IDENTIFICATION OF AMICUS CURIAE

The Harris County Criminal Lawyers Association [hereinafter the Association] is an unincorporated association of attorneys who practice criminal law in the courts of Harris County, Texas. Many of the members of the Association have represented persons charged with capital murder.

All parties have given the Association permission to file this brief. A copy of the letters of permission have been filed with the Clerk of this Court.

The Association appears for Petitioner.

STATEMENT OF AMICUS CURIAE

The Association believes that the Texas capital punishment system embodied in TEX. CODE CRIM. PROC. ANN. art. 37.071 is unconstitutional because it restricts the types of evidence that a jury can consider in mitigation of punishment. In addition, attorneys cannot as a practical matter introduce evidence which in other states would be the most compelling evidence in mitigation because that evidence would make it more likely that the defendant would be sentenced to death because of the unique special issue system used in Texas death penalty cases.

Under the Texas death sentencing system, if the jury finds affirmative answers to the special issues submitted to it, the judge is required to sentence the defendant to death -- even if all 12 jurors

believe that sufficient mitigating evidence or circumstances were presented warranting sentencing the defendant to life in prison rather than death.

ARGUMENTS AND AUTHORITIES

Last Term, in Franklin v. Lynaugh, ___ U.S. ___, 108 S. Ct. 2320 (1988), this Court held that a defendant in a Texas capital murder case has no Eighth Amendment right to instructions allowing a jury to consider "residual doubts" as to the defendant's factual guilt. The Court also held that the jury was able to consider a defendant's behavior in confinement prior to trial in mitigation.

The Association believes that based on the facts of Franklin, the Court had no option but to affirm the denial of habeas corpus relief. The record is clear that

Article 37.071 allowed the jury to consider all of the mitigating evidence presented by Franklin at his trial.

However, a majority of the Court held either that Article 37.071 violates the Eighth Amendment, (Stevens, J., dissenting), or that the statute might be unconstitutional if a defendant presented evidence that could not be considered in mitigation by a jury in answering the special issues in Article 37.071 because it was either irrelevant to the special issues or could not be considered in mitigation while answering the special issues (O'Connor, J., concurring).

The Association believes that Article 37.071 as applied by the Texas Court of Criminal Appeals is unconstitutional for two reasons: first because it does not provide a vehicle for the jury to give

effect to all mitigating evidence and second, because it fails to give a definition of deliberate in connection with the answer to Special Issue Number 1. This brief will be limited solely to the question of whether Article 37.071 unconstitutionally limits the consideration by juries of all mitigating evidence and hence is a violation of the Eighth Amendment.

Background

The facts of the instant case, as reported by the Court of Appeals, indicate that a jury could have found that Petitioner suffered from mental diseases or defects including some degree of mental retardation. Penry v. Lynaugh, 832 F.2d 915, 917 (5th Cir. 1988). All three psychiatrists who testified at Petitioner's

trial, including two who testified for the State, agreed that Petitioner's mental problems manifested themselves, among other ways, in an inability to learn from his mistakes. Id. The psychiatrists were, however, unable to agree on whether Penry's mental limitations were caused by birth trauma or by childhood environmental factors such as beatings and being locked in his room for extended periods. Id.

Petitioner's inability to learn from his mistakes is a significant factor in light of both his prior criminal record and Special Issue Number 2, whether Petitioner would constitute a continuing threat to society. As the Court of Criminal Appeals noted in its opinion, at the time of the instant offense, Petitioner was on parole for a previous rape conviction. Penry v. State, 691 S.W.2d 636, 653 (Tex. Crim. App.

1985), cert. denied, 474 U.S. 1073 (1986).

The Association would submit that Petitioner's mental disease and defects -- as well as the mental diseases and defects of uncounted others on Death Row in Texas -- constitute a mitigating factor that a jury could find outweighs aggravating factors and hence constitute evidence that a properly instructed jury could to return a sentence less than death. However, the structure of the Texas death penalty scheme prevents such an outcome. In fact, the structure of the Texas death penalty sentencing scheme makes a death sentence more likely given the evidence of mental disease or defect because it would be evidence that the defendant would be a continuing threat to society.

In the instant case, the Court of

Criminal Appeals cited Petitioner's "failure to reform himself" as one factor in finding sufficient evidence to support a "Yes" answer to the special issue on future dangerousness. Id. at 653. Yet, the psychiatrists who examined him agreed that an inability to learn from his mistakes was a symptom of his mental disease or defect. And, as the Court of Appeals noted, that mental disease or defect was caused either by birth truama or by childhood experiences that were not of Petitioner's doing. 823 F.2d at 917.

The Court of Criminal Appeals and the Court of Appeals for the Fifth Circuit cannot both be constitutionally correct. Petitioner's mental defect cannot at the same time be a factor in reducing his moral guilt and a factor in condemning him to death; at least without the statute

providing a means for the jury to consider weighing the mitigating value of that evidence.

"Mitigating Evidence" that Can Send A Defendant to Death Row

In a recent edition of the American Journal of Pscychiatry, a study was published that studied the mental health, neuropsychiatric, psychoeducational and family histories of 40 percent of the juveniles on Death Row. The study involved all 14 of the juveniles under sentence of death in four states. See generally, Lewis, et. al, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 Am. J. of Psychiatry 584 (1988). The study indicated that uniformly, juveniles on death row have a history of brain damage,

mental illness and abuse -- both physical and sexual.

The study shows that eight of the 14 condemned juveniles had suffered severe head injuries. Nine had neurological abnormalities including abnormal head circumferences or a history of seizures. Seven were psychotic at the time of the examination or had been diagnosed as psychotic in earlier childhood. An additional four had histories consistent with severe mood disorders. The remaining three subjects experienced periodic incidents of paranoia, at which time they often assaulted their perceived enemies.

Only two of the 14 had full scale I.Q.s over 100.

The study also indicated that 13 of the 14 were physically abused as children,

five were sexually abused and 13 of the 14 had histories of family violence or mental illness. The incidents of physical abuse included being hit on the head with a hammer by a stepfather, being seated on a hot burner by a stepfather, being hit on the head with a board by a father so severely that teeth were broken, being beaten by a father with boards and bullwhips and one who was beaten and stomped by an older brother, whipped by his mother and kicked in the head by a relative.

Petitioner was not a juvenile at the time of the offense for which he was sentenced to death. Texas does not allow the execution of a person for a crime committed before his 17th birthday. But, the study is relevant for two reasons. First, the study defined juveniles as those

who committed crimes before their 18th birthdays. So, at least theoretically Texans could be included in the study. Second, it is safe to assume that if all persons under death sentences for crimes committed before their 18th birthdays have such histories, then at least a high percentage of persons who commit capital murders after their 18th birthdays have similar histories.

The study concludes:

> Our data, based on evaluations of approximately 40% of the juvenile death row population, indicate that juveniles condemned to death in the United States are multiply handicapped. They tend to have suffered serious CNS [central nervous system] injuries, to have suffered since early childhood from a multiplicity of psychotic symptoms, and to have been physically abused.
>
> Theoretically, all of the vulnerabilities described -- neurological impairment, psychiatric illness, cognitive deficits, and

> parental abusiveness -- were potentially mitigating factors that, coupled with youthfulness, would have argued against the imposition of the death sentence.

Id. at 587.

Dr. Lewis and his colleagues would be wrong in Texas. Each of those factors which they believe to be mitigating are in fact aggravating factors in Texas because each of those factors make it more likely that the defendant would commit future crimes of violence.

The Internal Tension in Death Penalty Jurisprudence

As Justice O'Connor has noted, there is a tension between the two central themes of this Court's Eight Amendment capital punishment jurisprudence: limiting the discretion of the sentencing authority "by clear and objective standards so as to produce nondiscriminatory application" and

the requirement that the sentencer be allowed to consider any relevant mitigating evidence regarding the defendant's character or background and the circumstances of the particular offense. California v. Brown, ___ U.S. ___, 107 S. Ct. 837, 841 (O'Connor, J., concurring). Justice O'Connor further noted that the decision to impose a death sentence is neither a purely rational nor a purely emotional decision. Rather, it should "reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion." Id.

This Court has also held that while the Constitution requires states to limit narrowly a sentencing authority's power to impose the death penalty, they may not limit the ability to consider any evidence

that might cause the sentencer to decline to impose the death penalty. In determining whether to decline to impose the death penalty, the sentencer's discretion cannot be channeled. Rather, it must be allowed to consider all relevant information offered by the defendant. McCleskey v. Kemp, ___ U.S. ___, ___, 107 S. Ct. 1756, 1773-74 (1987). It follows directly that a jury or other sentencer must have the means to apply mitigating evidence as well as hear it. That is because the Constitution requires sentencing in capital cases to be individualized determinations of whether a particular defendant is to be executed and that determination must be based on the personal responsibility and moral guilt of the defendant, not on other factors. Booth v. Maryland, ___ U.S. ___, ___, 107 S. Ct.

2529, 2532-33 (1987).

This Court's unanimous decision in Hitchcock v. Dugger, ___ U.S. ___, 107 S. Ct. 1826 (1987), is highly relevant to the consitutionality of Article 37.071. In Dugger, the Court held that a death penalty was violative of the Eighth Amendment when the advisory jury was instructed not to consider -- and the judge who imposed the actual sentence did not consider -- a wide variety of mitigating factors not specifically authorized by statute. That sentence was vacated even though evidence of numerous mitigating factors was introduced before the jury.

Like the unconstitutional application of the Florida death sentencing system in Hitchcock, Article 37.071 operates in such a way as to allow all types of mitigating evidence to be introduced into evidence

while restricting the sentencer's ability to consider certain types in mitigation. See Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975), aff'd, 428 U.S. 262 (1976).

Evidence of Mental Illness:
A Texas Two-Edged Sword

Since this Court tentatively approved the Texas capital punishment system in Jurek, a majority of the Court of Criminal Appeals has consistently held that Article 37.071 gives adequate guidance to juries in considering of mitigating evidence. Yet, as shown above, evidence of mental illness, family background and even brain damage leads to the conclusion that a person is likely to commit future acts of criminal violence.

> Depending on one's perspective and focus, such evidence is at once damning and mitigating. It is this

> very paradox that renders asking the jury questions only in the language of 37.071(b) constitutionally insufficient. The truth is that many vicious criminals suffered at the hands of irresponsible and unfit parents; common knowledge holds that many violent criminals were physcially abused children and that the American crime rate rises and falls in direct proportion number of our citizens unde 35. When we prosecute such a person and place in the jury's hands the decision of whether that prson is to live or die, is it enough to protest that we have allowed him to adduce mitigating evidence, yet take no measure to ensure the jury's understanding of their role in regard to that evidence? I think not.
>
> ****
>
> In sum, a defendant is entitled to jurors whose consideration of mitigating circumstances is not limited to whether that evidence does or does not indicate future dangerousness. The jury must not be precluded in law or in practice from according independent weight to factors that are mitigating but perhaps irrelevant to the probability issue of future dangerous conduct.

Stewart v. State, 686 S.W.2d 118, 124-26 (Tex. Crim. App. 1984), cert. denied, 474

U.S. 866 (1985) (Clinton, J., dissenting)(emphasis in original).

The instant case is a perfect example of what Judge Clinton was discussing. There is no doubt that Petitioner suffers from severe mental illness and defects, albeit not of sufficient severity to make him either incompetent to stand trial or insane. The facts in the instant case, as recounted by the Court of Criminal Appeals, show that Petitioner committed a brutal rape-murder and that there was little question of Petitioner's factual guilt.

Once the jury rejected Petitioner's insanity defense, his best hope for avoiding a death sentence was to convince the jury that his mental defects were sufficient to reduce his moral guilt below that necessary to justify a death penalty. Yet, Article 37.071 provided no vehicle for

that jury to mitigate punishment.

The Court of Criminal Appeals has placed defendants in capital murder trials in a Catch-22 situation. They either cannot introduce evidence of mental disease or defect because of the risk of an affirmative answer on Special Issue Number 2 or they introduce the evidence and hope the jury will violate its oath.[1] The Court of Criminal Appeals has consistently refused to require instructions on how a jury can mitigate punishment. Despite this paradox, the Court and the Legislature have simply not provided a vehicle to either

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[1] The Court of Criminal Appeals has on several occasions vacated death sentences after finding insufficient evidence to support a "Yes" verdict to the special issue on future dangerousness. It has, however, never vacated a death sentence because the mitigating evidence outweighed the aggravating evidence.

focus a jury's attention on mitigating evidence or a vehicle for the jury to mitigate puishment if it so desires.

Wainwright v. Witt: Following the Juror's Oath

This Court has held that a key factor in determining whether a prospective juror may be excluded for cause in a capital case is whether the juror can follow his oath. Wainwright v. Witt, 469 U.S. 412 (1985); Adams v. Texas, 448 U.S. 38 (1980). Simply put, if a juror cannot swear to follow the Court's instructions at the punishment stage of a capital murder trial, the State is entitled to challenge that prospective juror for cause.

In Texas, the practical effect of Witt is to make it impossible for a juror to exercise mitigation based on mental disease or defect if that mental disease or defect

also makes it more likely that the defendant will continue to commit crimes of violence. Consider the following hypothetical example as applied to Texas law:

A person commits an execution-style murder during a robbery. At the punishment stage of his trial, all parties agree that the defendant was able to deliberate and all parties agree that he is subject to fits of extreme anger due to irreversible organic brain damage. All parties also agree that the defendant received this organic brain damage when he was struck in the bead by shrapnel from a Viet Cong mortar shell while he was serving in the U.S. Army. And, the evidence shows that the defendant won the Medal of Honor as a result of his actions during that shelling.

Applying those facts to Article

37.071, the defendant must be sentenced to death if the jury is to follow its oath. The facts show beyond a reasonable doubt that the murder was deliberate and that the defendant would be dangerous in the future. Even if all 12 jurors wished to sentence that defendant to life in prison, the judge would be required to assess a death penalty.

Admittedly, the facts in the hypothetical example are extreme. But, attached to this brief as Appendix A is an affidavit from a juror who served in a Texas capital murder trial. The juror noted that, under the instructions given that jury under Article 37.071, he felt that he could not consider whether the defendant could be rehabilitated in determining the answer to Special Issue Number 2.

CONCLUSION

As long as the United States retains capital punishment, there will be tension between between guiding discretion and allowing the jury to mitigate punishment. In effect, the purpose of capital punishment is to determine which defendants are so worthless and dangerous that they should be removed from society eternally.

The Association concedes that it is difficult to balance guided discretion with the unlimited ability to mitigate in such a way to ensure that discretion does not mean that capital punishment is limited to the poor or members of racial minorities while the rich and the white escape the executioner's needle. With each death penalty case decided by our courts, society will gain experience in designing procedures that will guarantee that the

death penalty, if it is to be imposed at all, is imposed only for proper reasons and without regard to impermissible factors.

The Constitution requires that capital sentencing be an individualized determination based on personal responsibility and moral guilt. The current Texas death penalty sentencing system embodied in Article 37.071 simply does not meet this requirement.

Since this Court affirmed Jurek, a majority of the Court of Criminal Appeals has felt that all that is necessary to comply with the Constitution is to allow the defense to place into evidence anything it feels is mitigating without giving juries a method of applying that evidence outside of the narrow structure of Article 37.071 and its special issues. The jury in

a capital murder case simply does not have a vehicle to mitigate punishsment. It is impossible under the procedures in Article 37.071 and the special issue system embodied in that statute for a jury to consider in mitigation evidence such as mental disease or defect that would reduce a defendant's moral guilt while making it probable that the defendant will commit crimes of violence in the future.

This Court has made it abundently clear that there can be no limits on what a jury can consider in mitigation. The Texas capital punishment procedure sets limits on the consideration of mitigation by failing to provide a way to exercise and apply the discretion that a sentencer must have. Texas must develop a system of capital sentencing that properly limits the discretion of the jury to impose the death

sentence without forcing the jury to assess a death penalty on a person who, in the Texas vernacular, "does not need killing" for the reasons articulated by this Court in Booth, McCleskey and Brown.

Article 37.071 fails to meet these constitutional requirements. Hence, it violates the Eighth and Fourteenth Amendments.

Respectfully Submitted,

STANLEY G. SCHNEIDER
11 GREENWAY PLAZA
SUITE 3112
HOUSTON, TEXAS 77046
(713) 961-5901

ATTORNEY FOR
AMICUS CURIAE

CERTIFICATE OF SERVICE

I certify that copies of this Motion for Leave to File Brief of Amicus Curiae and Brief of Amicus Curiae was served on all parties pursuant to Rule 28.

STANLEY G. SCHNEIDER

APPENDIX A

A F F I D A V I T

STATE OF TEXAS |

COUNTY OF HARRIS |

BEFORE ME, the undersigned authority, on this day personally appeared Ronald E. Vanderslice, who, after being by me duly sworn, under oath, stated as follows:

My name is Ronald E. Vanderslice. I live in Katy, Texas. I was a juror in the State of Texas v. John D. Matson and the Defendant was assessed the death penalty.

Considerable time has passed since the John Matson trial thus allowing time for reflection on what was a very stressful time for many of us on the jury. This was a particularly difficult time for me as I had to wrestle with two religious beliefs; (1) we are subject to mans laws and should be obedient to same, and (2) revenge should be God's will.

Appendix A

During the guilt phase of the deliberation, I found it necessary to remind the jury of the oath each of us took to make the necessary decision predicated on the evidence presented. I stated to the jury "I would desire nothing more than to take John in my arms and forgive him, since I personally believe in forgiveness." However, as jurors, our decision was limited to a guilty or not guilty verdict.

Several times during the punishment phase I reflected to myself "what if" the judge had allowed the jury to consider the rehabilitation of John Matson in the deliberation. However, since this was not to be considered, one had to remove this thought and follow "the letter of the law."

SIGNED and ENTERED on this 7th day of December, 1987.

/s/Ronald E. Vanderslice

Ronald E. Vanderslice

SUBSCRIBED and SWORN to before me, the undersigned authority, on this 7th day of December, 1987.

/s/ Barbara Puglia

BARBARA PUGLIA, NOTARY PUBLIC
STATE OF TEXAS
My commission expires: 4-23-88